Supreme Court, U.S.
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No.
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In The

Supreme Court of the United States

October Term, 1996

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MAURICIO CRIALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a dismissal for failure to comply with the statute of limitations contained in Title VII of the Civil Rights Act of 1964 is a dismissal "for lack of jurisdiction" within the "special meaning" of Fed. R. Civ. P. 41(b), and therefore not a *res judicata* bar to a second lawsuit raising the same claims.

STATEMENT REQUIRED BY RULE 29.6

American Airlines, Inc. is a wholly-owned subsidiary of AMR Corporation. American has no subsidiaries that are nonwholly owned.

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OPINIONS BELOW

Petitioner American Airlines, Inc. ("American") seeks review of a decision of the United States Court of Appeals for the Second Circuit which, with the dissenting opinion, is reported as *Criales v. American Airlines, Inc.*, 105 F.3d 93 (2d Cir. 1997), and is reproduced in the appendix to this petition (App. 1a-16a). The opinion of the district court is available on Westlaw, *Criales v. American Airlines, Inc.*, 95-CV-1709, 1995 WL 669900 (E.D.N.Y. Nov. 6, 1995) ("*Criales II*"), and is reproduced in the appendix (App. 17a-40a). The district court's decision dismissing respondent Mauricio Criales' first Title VII lawsuit on the ground of untimeliness is unreported ("*Criales I*"), and is also reproduced in the appendix (App. 41a-52a).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. American filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on February 4, 1997. That petition was denied in an Order dated and filed April 23, 1997, which is reproduced in the appendix (App. 53a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

Section 706(e)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(e)(1), and Rule 41(b) of the Federal Rules of Civil Procedure are pertinent to this case.

Section 706(e)(1) of Title VII provides as follows:

§ 2000e-5. Enforcement provisions

* * *

(e) Time for filing charges; time for

> **service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system**
>
> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(e)(1).

Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

> **Rule 41. Dismissal of Actions**
>
> * * *
>
> **(b) Involuntary Dismissal: Effect Thereof:** For failure of the plaintiff to prosecute or to comply with these rules or

> any other order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b).

STATEMENT OF THE CASE

This case presents the recurring question of whether a statute of limitations dismissal of a Title VII suit "operates as an adjudication upon the merits" for purposes of Fed. R. Civ. P. 41(b) and *res judicata*. Relying on this Court's pre-Title VII decision in *Costello v. United States*, 365 U.S. 265 (1961), the Second Circuit majority ruled that the district court's dismissal of *Criales I* on statute of limitations grounds was not an adjudication upon the merits, but rather was a dismissal for "lack of jurisdiction" within the "special meaning" of Rule 41(b) (App. 10a-11a). While the Fourth Circuit has embraced a similar rationale, the Second Circuit's resolution of this question conflicts with the decisions of the First, Fifth, Sixth and Eighth Circuits, as well as the purposes and policies of the doctrine of *res judicata*. The Second Circuit's decision, as well as *Costello*, also cannot be reconciled with other decisions of this Court, including *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but [is] like a statute of limitations"); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995) ("[t]he rules of finality, both

statutory and judge-made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim . . . as a judgment on the merits"); and *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 399 n.3 (1981) ("the *res judicata* consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong"; a Rule 12(b)(6) dismissal is a " 'judgment on the merits' ").

On December 20, 1991, American fired Criales, a former union-represented airline mechanic, for submitting a false expense report. The termination was sustained in arbitration by a three-member Railway Labor Act Board of Adjustment (App. 3a). After his discharge, Criales filed two national origin discrimination charges against American concerning his termination: (1) a February 5, 1992 EEOC charge (No. 160-92-1069), which was transferred for processing to the New York State Division of Human Rights ("NYSDHR"); and (2) a December 3, 1992 charge with the New York City Commission on Human Rights, which was transferred for processing to the EEOC (No. 160-93-0816). While Criales' February 1992 charge was pending, the EEOC dismissed the December 1992 charge as untimely, and on October 26, 1993 issued Criales his statutory right-to-sue notice relating to the December 1992 charge (App. 3a-4a).

In November 1993, based on the right-to-sue notice relating to his untimely December 1992 charge, Criales filed a *pro se* complaint in the district court (*Criales I*), alleging Title VII violations (App. 4a).[1] Criales thereafter retained counsel, who

1. At the time *Criales I* was filed, Criales' February 1992 EEOC charge was still pending before the NYSDHR (App. 4a). However, on August 29, 1994, *before* the district court dismissed *Criales I*, the NYSDHR notified Criales and American by letter than it had dismissed the February 1992 charge, explaining that Criales' discrimination claims were being litigated in federal court (App. 4a-5a).

filed an amended complaint alleging national origin discrimination under Title VII and 42 U.S.C. § 1981 (*Id.*). The amended complaint also sought to set aside the arbitration board's decision, and asserted state law claims of defamation and intentional infliction of emotional distress (App. 50a-52a).

On November 14, 1994, the district court granted American's motion to dismiss in *Criales I* under Fed. R. Civ. P. 12(b)(6). The court dismissed Criales' Title VII claims on the ground his EEOC discrimination charge was untimely filed (App. 4a; 46a-48a). The district court also dismissed on their merits Criales' § 1981 claims and his claim to set aside the arbitration decision, and dismissed the state law claims for lack of jurisdiction (App. 48a-52a). On December 1, 1994, Criales filed a *pro se* notice of appeal with the Second Circuit (App. 4a). On August 3, 1995, on the advice of counsel, Criales filed a motion to withdraw his appeal in *Criales I* "with prejudice" (App. 5a & n.1). The court of appeals granted Criales' motion on August 8, 1995 (App. 5a).

In the meantime, on January 31, 1995, the EEOC issued Criales a Notice of Right to Sue with respect to his timely-filed February 1992 EEOC charge (*Id.*). On April 28, 1995, Criales (through counsel) filed the complaint in *Criales II* alleging race discrimination under Title VII and § 1981, and state law claims for defamation and intentional infliction of emotional distress (*Id.*). On July 10, 1995, while Criales' appeal in *Criales I* was pending, American filed its Fed. R. Civ. P. 12(b)(6) motion to dismiss *Criales II*, contending that the decision in *Criales I* barred the discrimination claims raised in *Criales II* under well-settled *res judicata* principles (App. 5a; 23a).

On November 6, 1995, the district court granted American's motion, dismissing Criales' Title VII and § 1981 race discrimination claims as barred by the doctrine of *res judicata*

(App. 5a-6a; 23a-34a). Rejecting Criales' contention that the dismissal in *Criales I* could be likened to a dismissal for "lack of jurisdiction" under Fed. R. Civ. P. 41(b), the district court held, in reliance on *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 388 (1982), and other authority, that "the dismissal of *Criales I* was predicated on a lack of statutory prerequisite, not a 'lack of jurisdiction' " (App. 29a). The district court also exercised its discretion not to retain jurisdiction over the supplemental state law claims (App. 39a).

Criales appealed once again, and on January 21, 1997, the Second Circuit vacated that portion of the district court's decision dismissing Criales' Title VII claims on *res judicata* grounds (App. 13a, 14a).[2] The majority reached that conclusion despite acknowledging that "the district court's dismissal of Criales's complaint arising from his untimely charge was styled as a dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and that dismissals under Rule 12(b)(6) are generally considered judgments on the merits, unless the court specifies otherwise" (App. 11a) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981)).

Although it cited *Zipes* for a different proposition (*see* App. 12a), the court of appeals relied on the pre-Title VII decision of *Costello v. United States*, 365 U.S. 265 (1961),[3] stating that "[a]lthough the district court viewed the problem [in *Criales I*]

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2. The court of appeals also vacated that portion of the district court decision dismissing Criales' state law claims for lack of jurisdiction, but affirmed the dismissal of Criales' remaining federal claims (App. 14a).

3. In *Costello*, a case brought by the United States to revoke an order admitting the defendant to citizenship, the Court held that when a dismissal occurs because a party has failed to satisfy certain prerequisites to suit, it should be treated as one for lack of jurisdiction. 365 U.S. at 285-88.

as one of untimeliness, it is more appropriately seen as one of prematurity" (App. 6a). The court of appeals reasoned:

> Because [Criales] remained capable of complying with [a precondition requisite] by instituting his [second] suit after receipt of the right-to-sue notice on the timely charge, the dismissal of the first complaint should not have been found to operate as an adjudication upon the merits and as a bar to the subsequent complaint filed after the precondition had been satisfied. It was a dismissal "for lack of jurisdiction" within the *special meaning* of that term in Rule 41(b), as explained in *Costello*.

(App. 11a) (emphasis added). The court of appeals went on to state that "*Costello* makes clear that a dismissal in these circumstances (for failure to comply with a statutory prerequisite to suit) operates as a dismissal for 'lack of jurisdiction' " (App. 13a, n.3). The majority also believed that *res judicata* was not applicable because American "had not been 'put to the necessity of preparing a defense' " (App. 10a) (quoting *Costello*, 365 U.S. at 287), and emphasized the harshness of the district court's "drastic ruling" (App. 12a) — " '[i]n properly seeking to deny a litigant two 'days in court,' courts must be careful not to deprive him of one' " (App. 13a) (citation omitted).

In dissent, Judge Miner explained that, by basing its decision upon *Costello*, the majority disregarded this Court's holdings in *Moitie* and *Zipes* (App. 14a-15a).[4] Judge Miner was

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4. Judge Miner also dissented from the majority's ruling to reinstate Criales' state law claims, but concurred in the decision to affirm the dismissal of Criales' remaining federal law claims (App. 14a, 16a).

particularly troubled by the majority's reliance upon *Costello* in light of this Court's subsequent decision in *Zipes*:

> [w]hatever may have been the rule in *Costello*, it cannot be applied in a Title VII action involving untimely filing with the EEOC. It is because the "statutory requirement is analogous to a statute of limitations," . . . that dismissal for failure to comply with the requirement is a judgment on the merits . . .

(App. 15a-16a) (citations omitted).

Judge Miner explained that "[a]lthough the result envisioned by the foregoing is most unfortunate, it could have been avoided" (App. 16a). Criales could have pursued two options in order to avoid dismissal on the ground of *res judicata*: (1) Criales could have moved for a stay of *Criales I* pending receipt of a right-to-sue notice relating to his timely-filed February 1992 EEOC charge; or (2) Criales could have requested the district court to dismiss *Criales I* "without prejudice to renewal upon receipt of the timely right-to-sue letter" (*Id.*). Judge Miner concluded that Criales' "failure to have considered these alternatives leaves [him] in his present bind" (*Id.*).

REASONS FOR GRANTING THE WRIT

This case presents the fundamental question whether a dismissal for failure to file a timely Title VII charge with the EEOC "operates as an adjudication upon the merits" for purposes of Fed. R. Civ. P. 41(b) and *res judicata*. The Second Circuit's decision is contrary to decisions by this Court foreclosing "*ad hoc* determinations" of the finality of judgments. It is also contrary to this Court's holdings that filing a timely charge of discrimination with the EEOC is *not* a jurisdictional prerequisite

to filing a Title VII action in federal court, but rather is similar to a statute of limitations, and that a statute of limitations dismissal is a judgment on the merits. In addition, the Second Circuit's conclusion that the district court's dismissal of Criales' first Title VII suit on the ground of untimeliness was not an adjudication upon the merits under Rule 41(b) conflicts with decisions of the First, Fifth, Sixth and Eighth Circuits, as well as the overriding policies and purposes of the doctrine of *res judicata*.[5] As still other circuits have recognized, the continued vitality and scope of the "special meaning" (App. 11a) exception of *Costello v. United States*, 365 U.S. 265 (1961), to Rule 41(b) jurisdiction questions is an unresolved source of continuing confusion even outside the arena of discrimination law.[6]

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5. The only court of appeals that has decided the issue presented and not rejected the Second Circuit's approach is the Fourth Circuit. *See Stebbins v. Nationwide Mut. Ins. Co.*, 528 F.2d 934, 936 (4th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976).

6. *See Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180-81 & n.1 (4th Cir. 1989) (distinguishing *Costello* from cases presenting statute of limitations issues and finding that *ad hoc* determinations of equities are inconsistent with *Moitie* and *res judicata* principles); *id.* at 1184-85 (Murnaghan, J., dissenting) (arguing that *Costello* allows courts to decline to give *res judicata* effect in certain statute of limitations cases involving "unusual" or "extraordinary circumstances"); *Marin v. HEW, Health Care Financing*, 769 F.2d 590, 593 (9th Cir. 1985) (*Costello* gives a "broad reading to the jurisdictional exception set forth in Rule 41(b) . . ."), *cert. denied*, 474 U.S. 1061 (1986); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (suggesting that *Costello* has continuing vitality if jurisdictional defects "could be remedied by *occurrences subsequent to the original dismissal*") (emphasis original); *see also* J. Eichhorst, *Res Judicata Effects of Involuntary Dismissals: When Involuntary Dismissals Based Upon Prematurity Or Failure To Satisfy A Precondition To Suit Should Bar A Second Action*, 70 Cornell L. Rev. 667, 670-85 (1985) (collecting cases that do and do not apply *Costello's* "new jurisdictional exception" to actions involving dismissals for failure to satisfy preconditions to suit, and recognizing that courts that decline to apply *Costello* "have ameliorated the unfairness to the defendant and harm to judicial economy that can result from strict application of the *Costello* 'jurisdictional' test").

This Court has never ruled on the question presented in this case, and prompt resolution of the conflict in the courts of appeals is a matter of critical importance for Title VII jurisprudence and the finality of judgments in general. Until reversed or set aside, the Second Circuit's decision will encourage multiple litigation under Title VII, other federal and state anti-discrimination statutes and common law tort or contract theories. And, until the Court determines whether *Costello* is still good law or clarifies its application to Title VII cases, the unresolved scope of Rule 41(b)'s exception for jurisdictionally-based dismissals will impair principled application of *res judicata* in succeeding litigations under discrimination and other statutes that impose "preconditions" to suit.

I.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, AND DEMONSTRATES THAT THERE IS AN APPARENT CONFLICT BETWEEN *COSTELLO* AND AT LEAST TWO OTHER DECISIONS OF THIS COURT.

In ruling that the dismissal of the untimely Title VII claim in *Criales I* was not an adjudication on the merits because Criales had merely failed to satisfy a "precondition" to suit within the meaning of *Costello*, the Second Circuit disregarded explicit holdings of this Court. Because the Second Circuit's decision is based upon an *ad hoc* determination of fairness to a particular plaintiff (App. 11a-13a), and not the rigid application of *res judicata*, it contravenes this Court's repeated admonitions that a rigorous application of *res judicata* principles must not give way to a court's "*ad hoc* determination of the equities in a particular case." *E.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981); *Hart Steel Co. v. Railroad Supply*

Co., 244 U.S. 294, 299 (1917); *Jeter v. Hewitt*, 63 U.S. 352, 364 (1859). "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principles of *res judicata*.' " *Moitie*, 452 U.S. at 401 (*quoting Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)). This approach promotes the evenhanded administration of justice and judicial economy, and "serves vital public interests." *Moitie*, 452 U.S. at 401; *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

The Second Circuit's application of *Costello* to Title VII timeliness "preconditions" — to draw *Criales I* into Rule 41(b)'s "lack of jurisdiction" exception — also cannot be reconciled with this Court's decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). *Zipes* makes plain that "filing a timely charge of discrimination with the EEOC is *not* a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Id.* at 393 (emphasis added). Indeed, "the structure of Title VII" and "the congressional policy underlying it" demonstrate that the timely filing requirements cannot be considered "jurisdictional" for any purpose:

> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. § 2000e-5(e) and (f), does *not* limit jurisdiction to those cases in which there has been a timely filing with the EEOC. It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

Id. at 393-94 (footnotes omitted; emphasis added).

The Second Circuit's decision therefore creates an unworkable anomaly whereby courts must deem Title VII's charge-filing "preconditions" to be statutes of limitations under *Zipes*, but are authorized to treat the same preconditions as jurisdictional requirements under Rule 41(b) and *Costello*'s "special meaning" when they seek to work equity and avoid "drastic" rulings (*see* App. 11a, 12a).[7] The Second Circuit's approach not only creates an unacceptable conflict between Title VII's timeliness requirements and the purportedly differing requirements of Rule 41(b), but it also contravenes this Court's admonition in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984), that the "[p]rocedural requirements established by Congress for gaining access to the federal courts [under Title VII] are not to be disregarded by courts out of a vague sympathy for particular litigants."

In addition to its incompatibility with Title VII principles, the Second Circuit's approach violates this Court's express directives that a statute of limitations dismissal is an adjudication upon the merits for purposes of Rule 41(b) and the doctrine of *res judicata*. "The rules of finality, both statutory and judge-made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: *as a judgment on the merits*." *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995) (*citing* Rule 41(b); emphasis added); *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1916)

7. Commentators have also criticized *Costello*'s interpretation of the "lack of jurisdiction" exception in Rule 41(b). 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4435 at 337 (1981). Professors Wright, Miller and Cooper opine that *Costello*'s "method of interpreting Rule 41(b) is directly objectionable because it involves so slippery a method of manipulating the concept of jurisdiction." *Id.* at 335. They conclude that *Costello*'s interpretation of the term "jurisdiction" is both distorted and ambiguous, "demonstrat[ing] the capacity of the *Costello* opinion to confuse proper analysis." *Id.* at 337.

("A plea of the statute of limitations is a plea to the merits, . . . and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution"); *see also Moitie*, 452 U.S. at 399 n.3 (a Rule 12(b)(6) dismissal, as here (App. 11a), operates as a " 'judgment on the merits' " for purposes of *res judicata*).[8]

II.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE PERTINENT DECISIONS OF OTHER COURTS OF APPEALS.

In view of this Court's holdings, the courts of appeals for the First, Fifth, Sixth and Eighth Circuits have all reached a conclusion opposite to that of the Second Circuit, holding that a dismissal for failure to comply with Title VII's or the Age Discrimination In Employment Act's ("ADEA's") timely-filing "preconditions" to suit operates as an adjudication upon the merits under Rule 41(b). *See Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 826 (8th Cir. 1989) ("a disposition of a Title VII action as untimely filed is a decision on the merits for purposes of res judicata"); *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 562 (5th Cir. 1983) (*en banc*) (same), *rev'g*, 674 F.2d 379 (5th Cir. 1982); *see also Kale v. Combined Ins. Co. of Am.*, 924 F.2d 1161, 1164 (1st Cir.) ("It is beyond peradventure that the dismissal of a claim [under the ADEA] as time-barred constitutes a judgment on the merits, entitled to preclusive effect"), *cert. denied*, 502 U.S. 816 (1991); *Cemer v.*

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8. The Second Circuit's recognition of a "new facts" exception to the application of *res judicata* (App. 12a), also undermines the *Moitie* rule that a Rule 12(b)(6) dismissal is a judgment on the merits for purposes of *res judicata*. Indeed, "[i]f simply submitting new evidence rendered a prior decision factually distinct, *res judicata* would cease to exist." *Torres v. Shalala*, 48 F.3d 887, 894 (5th Cir. 1995).

Marathon Oil Co., 583 F.2d 830, 831-32 (6th Cir. 1978) (concluding that the dismissal of an untimely ADEA action was an adjudication on the merits for purposes of Rule 41(b)). The Fourth Circuit is the only court of appeals to consider the issue that has not rejected the Second Circuit's approach. *See supra* note 5.[9]

The Fifth Circuit's *en banc* decision in *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556 (5th Cir. 1983), *rev'g*, 674 F.2d 379 (5th Cir. 1982), underscores both the conflict the Second Circuit's decision has created and the error of its rationale.[10] The *en banc* Fifth Circuit, relying upon *Zipes*, held that "the timely filing requirements of Title VII are to be treated as limitations periods *for all purposes*," including application of the doctrine of *res judicata*. *Id.* at 562 (emphasis added). The Fifth Circuit explained:

> Based on *Zipes*, we hold that the timely filing requirements of Title VII are to be treated as limitations periods *for all purposes*. *Zipes* clearly holds that these requirements are not jurisdictional, so that in any event it is beyond our power to declare

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9. Notably, numerous courts, including the Second and Fourth Circuits, have held that the *Costello* analysis does not apply in determining the *res judicata* effect of a prior statute of limitations dismissal outside of the Title VII or discrimination law context. *E.g.*, *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180-81 (4th Cir. 1989) (collecting cases); *PRC Harris, Inc. v. Boeing* Co., 700 F.2d 894, 896-97 n.2 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983).

10. *See also Miller v. United States Postal Serv.*, 825 F.2d 62, 63-64 (5th Cir. 1987) (relying on *Nilsen*, court concluded that plaintiff's claim under the Rehabilitation Act of 1973 was barred by *res judicata*, where, like the present case (App. 3a-5a), that claim was pending before the administrative agency at the time his original Title VII action was dismissed as untimely).

> them to be so. This leaves us only the choice between viewing them as either limitations periods or as provisions *sui generis* — subject to waiver and to equitable tolling, but nevertheless not merits adjudications for purposes of the preclusion doctrines. We see no reason to reach the second — as it seems to us — bizarre result, especially in view of *Zipes'* entire failure to envision it and its repeated analogizing of these provisions to "limitations periods."[11]

Id. (emphasis added). The Fifth Circuit is right, and the Second Circuit is wrong. As set forth above, at least three other circuits have agreed with the Fifth Circuit and disagreed with the Second Circuit. *See supra* pages 13-14.

As the Fifth Circuit in *Nilsen* also recognized, this Court's "repeated analogizing" of Title VII's timely-filing requirements to "limitations periods" in *Zipes* and its progeny makes clear that this Court never envisioned that a court would use *Costello*'s broad interpretation of the term "jurisdiction" under Rule 41(b) to nullify settled *res judicata* principles in the context of an untimely Title VII claim. 701 F.2d at 562. Yet, by relying on *Costello* to attribute "special meaning" (App. 11a) to the term "jurisdiction" under Rule 41(b), that is precisely what the Second

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11. Prior to the *en banc* decision, a panel of the Fifth Circuit had all but decided that *Zipes*, and not *Costello*, governs the question whether the dismissal of an untimely Title VII suit is an adjudication on the merits (as opposed to a dismissal "for lack of subject matter jurisdiction") for purposes of *res judicata*. 674 F.2d at 382-83 & nn.3, 5. As the *en banc* Fifth Circuit recognized, the panel "veer[ed] away [from making that determination] only at the last minute because it concluded that a resolution of it was not necessary to its decision." 701 F.2d at 562. The *en banc* Fifth Circuit resolved that issue by relying upon *Zipes*, and not *Costello*. *Id.*

Circuit has done in this case, and courts will do so in the future if they follow the Second Circuit's, rather than the Fifth Circuit's, lead on this issue.

Thus, although the conflict in rationales is most vividly spelled out in the *en banc* decision of the Fifth Circuit in *Nilsen*, 701 F.2d at 562, it is clear that this case would have been decided differently in at least four of the federal courts of appeals, all of which have recognized that a dismissal for failure to file a timely Title VII or ADEA claim operates as an adjudication on the merits for purposes of *res judicata*. *See supra* pages 13-14.

III.

PROMPT RESOLUTION OF THIS CONFLICT IS A MATTER OF GREAT NATIONAL IMPORTANCE.

Not only is there a fundamental conflict on the question presented, but prompt resolution of this conflict is a matter of national importance with profound, immediate implications. The Second Circuit's decision completely vitiates the policies and purposes underlying the doctrine of *res judicata*, thereby permitting parties to relitigate matters that easily could have been raised in a prior lawsuit and creating havoc in future employment discrimination cases. It will encourage piecemeal litigation, distort statutory requirements in favor of individual notions of equity and disrupt settled expectations based upon the holdings of *Zipes, Plaut* and *Moitie*.

In contrast, the approach embraced in Title VII and ADEA cases by the First, Fifth, Sixth and Eighth Circuits recognizes the salutary principle of *res judicata*. Most notably, the approach embraced by these circuits does not deprive a plaintiff of his or her day in court; rather, those circuits simply require, consistent with this Court's teachings, that a plaintiff bring all claims based

on the same underlying facts in one action. Such an approach recognizes the need for finality and avoidance of inconsistent results — the cornerstone principles of *res judicata*. This rigid application of *res judicata* produces sensible results which should not be disregarded lightly.

Moreover, in seeking to avoid an allegedly "drastic" result (App. 12a), the Second Circuit's result-oriented approach disregards that, during the pendency of *Criales I*, Criales easily could have raised his Title VII claims based upon his timely-filed February 1992 EEOC charge — but he and his counsel made a tactical decision not to do so. As Judge Miner recognized in his dissenting opinion, during the pendency of *Criales I*, Criales had several options for preserving his Title VII claim relating to his timely EEOC charge: (1) he "could have moved to stay [*Criales I*] pending receipt of a right-to-sue letter that resulted from the timely filing of his first [February 1992] administrative charge"; or (2) he "could have requested the district court to dismiss the prior action without prejudice to renewal upon receipt of the timely right-to-sue letter" (App. 16a). The majority failed to acknowledge that, after 180 days, "issuance of [EEOC] suit letters is a purely ministerial task involving the exercise of no official discretion." *Stebbins*, 528 F.2d at 937 n.5. Indeed, this Court has recognized that "a complainant . . . may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court" after 180 days. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977); *see also Stebbins*, 528 F.2d at 937 n.5 ("Such [right-to-sue] letters are issued upon request after expiration of the statutorily prescribed waiting period").[12]

12. Contrary to the majority's opinion, the procedural history in this case is not "unusual" (App. 2a) or "complex" (App. 3a). Numerous cases demonstrate that employment discrimination plaintiffs often file more than one EEOC charge, and often file federal court actions at the same time they (Cont'd)

Further, Criales could have filed a motion under Fed. R. Civ. P. 60 to vacate or modify the judgment in *Criales I*, or he could have pursued his direct appeal in *Criales I* (which he voluntarily withdrew with prejudice).

In addition to the overriding interest of ensuring the finality of judgments, the corresponding interest in promoting judicial economy is equally vital. Indeed, the overburdened dockets of today's federal courts require that court access be denied to those who have had an opportunity to litigate their claims in a prior action. *See, e.g., Moitie*, 452 U.S. at 401 (recognizing that the policies favoring *res judicata* are "even more compelling in view of today's crowded dockets"). "It would undermine the basic policies protected by the doctrine of *res judicata* to permit [a party] to once again avail [himself] of judicial time and energy while another litigant, who has yet to be heard even once, waits in line behind [him]." *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 596 (7th Cir. 1986). In short, allowing Criales to maintain a second Title VII action following the Rule 12(b)(6) dismissal of his first, untimely Title VII lawsuit interferes with the quest for efficient docket management and strips the original decision of its legal significance.

(Cont'd)
have a charge pending before the EEOC. *E.g., Weiss v. Coca Cola Bottling Co. of Chicago*, 990 F.2d 333, 335 & n.1 (7th Cir. 1993); *Prochotsky v. Baker & McKenzie*, 966 F.2d 333, 334-35 (7th Cir. 1992); *Miller v. United States Postal Serv.*, 825 F.2d 62, 63-64 (5th Cir. 1987); *Bailey v. USX Corp.*, 658 F. Supp. 279, 281-82 (N.D. Ala. 1987), *aff'd*, 850 F.2d 1506 (11th Cir. 1988). Yet *res judicata* is no less applicable to Title VII claims simply because Congress saw fit to require that a plaintiff exhaust his administrative remedies before commencing a federal court action. *Prochotsky*, 966 F.2d at 334-35 (concluding that plaintiff's Title VII claim was barred by *res judicata*, where her Title VII charge was pending at the EEOC at the time her original ERISA action had been dismissed).

Moreover, unless the Second Circuit's decision is overturned, courts will have separate rules for determining the preclusive effect under Rule 41(b) of limitations dismissals in Title VII actions and limitations dismissals in all other civil actions. *Compare Criales II* (App. 6a-14a) (dismissal of an untimely Title VII action is not an adjudication upon the merits), and *Stebbins*, 528 F.2d at 936 (same), *with Plaut*, 115 S. Ct. at 1457 (statute of limitations dismissal of federal securities law claims operates as an adjudication upon the merits under Rule 41(b)), *Shoup*, 872 F.2d at 1181 (dismissal of an untimely personal injury suit is an adjudication upon the merits), and *PRC Harris*, 700 F.2d at 896-97 & n.2 (dismissal of an untimely breach of contract action is an adjudication upon the merits). Clearly this Court never envisioned that the pre-Title VII decision in *Costello* could be applied to modify the *Zipes* holding to produce such an unworkable result.

Most significantly, this Court can end this potential confusion and disruption without burdening its docket. Because the majority opinion of the Second Circuit so thoroughly misapprehends settled principles of *res judicata* and disregards this Court's precedent, it would be entirely appropriate for the Court summarily to vacate the decision of the Second Circuit and remand with directions to dismiss the complaint.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, summarily vacate the Second Circuit's decision, and remand with directions that the complaint be dismissed on the ground of *res judicata*. Alternatively, the Court should grant the petition and give the case plenary consideration.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JANUARY 21, 1997 (105 F.3d 93)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1390—August Term, 1995

(Argued: April 19, 1996 Decided: January 21, 1997)

Docket No. 95-9170

MAURICIO CRIALES,

Plaintiff-Appellant,

—v.—

AMERICAN AIRLINES, INC.,

Defendant-Appellee.

Before:

MINER, MCLAUGHLIN, and LEVAL,

Circuit Judges.

Pro se plaintiff appeals from a judgment of the United States District Court for the Eastern District of New York (Glasser, *J.*) dismissing his discrimination complaint primarily on res judicata grounds.

Appendix A

Affirmed in part, vacated in part and remanded.

Judge Miner concurs in part and dissents in part by separate opinion.

MAURICIO CRIALES, Pro Se, Woodside, N.Y., *for Plaintiff-Appellant.*

EDWARD CERASIA II, New York, N.Y., (Seyfarth, Shaw, Fairweather & Geraldson, New York, N.Y., Of Counsel), *for Defendant-Appellee.*

LEVAL, *Circuit Judge*:

Mauricio Criales, appearing *pro se*, appeals from a judgment of the United States District Court for the Eastern District of New York (I. Leo Glasser, *Senior Judge*), dismissing his complaint. The complaint alleges in part that Criales's employer American Airlines, Inc. ("AA"), discriminated against him by reason of his Hispanic origin in violation of 42 U.S.C. § 2000e *et seq.* (codifying Title VII of the Civil Rights Act of 1964). The district court dismissed the complaint for a number of reasons including that the Title VII claims were barred by res judicata because of the previous dismissal of similar claims. In the unusual circumstances of this case, we conclude that the Title VII claims were not barred by res judicata.

We therefore reverse that portion of the judgment which dismissed Criales's Title VII claims on res judicata grounds.

Appendix A

I. Background

This case has a rather complex procedural history, which we explain here in some detail because it is crucial to our decision.

Criales is an American citizen who was born in the Republic of Colombia and is Hispanic. In November 1990, he was hired by AA to work as an airline mechanic at John F. Kennedy International Airport. The complaint alleges that his co-workers harassed and ridiculed him because of his Latino origin, and that AA officials condoned this harassment.

On December 7, 1991, AA suspended Criales while it investigated an allegation that he had filed a false expense report relating to his attendance at a training course in Chicago. Criales maintains that, at the hearing on his alleged misconduct, he tried unsuccessfully to assert his allegations of discriminatory harassment. Criales was terminated on December 20, 1991. On March 12, 1992, he and his union contested the termination before an arbitration panel, which upheld the dismissal.

Without the aid of counsel, Criales filed two administrative charges against AA alleging discrimination because of his national origin. The first charge, dated February 5, 1992, was filed with the Equal Employment Opportunity Commission ("EEOC") within the time allowed by Title VII. The EEOC transferred this charge for processing to the New York State Division of Human Rights ("NYSDHR"). After a number of months with no response, Criales filed a second similar charge, dated December 3, 1992, this time with the New York City Commission on Human Rights ("NYCCHR"); it was transferred for processing to the EEOC. The second

charge was not filed within the time allowed by Title VII. These two charges each alleged discrimination on the basis of national origin, and were based substantially on the same allegedly discriminatory conduct. *Compare* Brief of Appellant, Exhibit B, *with id.*, Exhibit C. The EEOC dismissed the December 1992 charge because it was not timely filed, and issued a right-to-sue notice in connection with that charge on October 26, 1993.

On November 18, 1993, after receiving the right-to-sue notice based on the untimely December 1992 charge (but before receiving a right-to-sue notice on his timely charge), Criales filed a *pro se* complaint in the district court. Criales then retained counsel and amended his complaint in several respects, adding claims under 42 U.S.C. § 1981, and pendent state law claims of defamation and intentional infliction of emotional distress. AA moved to dismiss the complaint for failure to state a claim. The district court granted the motion, ruling that Criales's Title VII claims must be dismissed because the underlying administrative charge (the one filed in December 1992) was not timely filed. *Criales v. American Airlines, Inc.*, 93 Civ. 5340 (E.D.N.Y. Nov. 17, 1994) ("*Criales I*"). The other claims were dismissed for various reasons that are not of significance to this opinion. On December 1, 1994, Criales, no longer represented by counsel, filed a *pro se* notice of appeal with this court.

Meanwhile, his first charge was making its way through the administrative process. As noted above, this timely charge had been referred by the EEOC for initial processing to the NYSDHR. On August 29, 1994, recognizing that Criales's complaint stemming from the second charge was being litigated in district court, the NYSDHR dismissed the timely charge for "administra-

tive convenience" on the rationale that the litigation of the second charge in the district court would resolve all the issues raised in the first charge. On January 31, 1995, while his appeal was pending, Criales received a right-to-sue notice on the timely charge.

Apparently seeking to inform this court that he could now proceed on the timely charge, Criales attempted to append his right-to-sue notice on the timely charge to his appellate brief. AA moved to strike the right-to-sue notice from Criales's brief on the grounds that it had not been in the record below. Criales then moved to withdraw his appeal without prejudice so that he could, as he put it in his motion papers, "seek judicial remedy in the Eastern District of New York on the basis of a newly issued, timely 'Right to Sue' letter by the EEOC." AA opposed the motion, and it was denied by this court on May 26, 1995, in an order stating that Criales would be permitted to withdraw his appeal with prejudice. On August 8, 1995, this court granted Criales's *pro se* motion to withdraw his appeal with prejudice.[1]

Criales (represented again by counsel) then filed a new complaint in the district court based on the new right-to-sue notice granted on the first, timely charge. AA moved to dismiss the complaint. The district court granted the motion, ruling that Criales's claims of discrimination under Title VII were barred by res judicata. *Criales v. American Airlines, Inc.*, 95 Civ. 1709, 1995 WL 669900 (E.D.N.Y. Nov. 6, 1995) ("*Criales II*"). The other federal claims were dismissed on various grounds, and the state claims were dismissed for lack of juris-

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[1] Although Criales filed this motion *pro se*, he indicated at oral argument that he did so after receiving informal advice from his former attorney.

diction, by reason of the absence of a valid federal claim to which they could be appended.

This appeal followed.

II. Discussion

The primary question raised by this appeal is as follows: Where a plaintiff filed two administrative charges alleging illegal discrimination under Title VII—one timely, the other untimely—and instituted suit upon the agency's delivery of a right-to-sue notice on the untimely charge, which suit was then dismissed by reason of the untimeliness of that charge, does that dismissal operate as an adjudication on the merits, barring the plaintiff from proceeding upon the timely charge? The district court believed it did. We disagree.

The prerequisites for a suit under Title VII include a timely filed administrative charge and timely institution of the suit after receipt of a right-to-sue notice. *See* 42 U.S.C. § 2000e-5(e)(1) (timely charge) & (f)(1) (right-to-sue notice); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S. Ct. 1011, 1019 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 93 S. Ct. 1817, 1822 (1973). Criales complied with both requirements. The only reason for the dismissal was that he had previously filed a suit, based on an untimely administrative charge, which suit was dismissed because of the untimeliness of the charge. Although the district court viewed the problem as one of untimeliness, it is more appropriately seen as one of prematurity. Had Criales waited to file his suit until receipt of the right-to-sue notice on the *timely* charge, there would have been no defect. The superfluous untimely administrative charge would have been irrelevant to Criales's right to proceed

on his timely charge. His problem was that he filed the initial complaint without waiting for the issuance of the right-to-sue notice based on his timely charge.

Like any other dismissal for failure to exhaust administrative remedies, a dismissal of a Title VII action by reason of a plaintiff's failure to wait for a right-to-sue notice is not a bar to instituting the suit after the notice is delivered. *See, e.g., Johnson v. Nyack Hosp.*, 86 F.3d 8, 10 (2d Cir. 1996) (noting district court's dismissal without prejudice for failure to exhaust administrative remedies); *see also Twitty v. Smith*, 614 F.2d 325, 335 n.16 (2d Cir. 1979) (dismissal for failure to exhaust state remedies is without prejudice). There is no reason why the result should be different here merely because plaintiff had filed a second administrative charge that was superfluous and untimely.

The district court believed the bar to suit was mandated by the terms of Rule 41(b) of the Federal Rules of Civil Procedure, which provides

> Unless the court in its order for dismissal otherwise specifies, . . . any dismissal . . . , other than a dismissal for lack of jurisdiction, [or for other specified reasons not here pertinent] operates as an adjudication on the merits.

The district court noted that courts have found the administrative time limits of Title VII to be subject to equitable tolling and estoppel and have thus considered them to be "not jurisdictional." *Criales II*, 1995 WL 669900, at *6. The court thus concluded that the dismissal for untimeliness of the charge was not within the "lack of jurisdiction" exception of Rule 41(b), and that it operated as an adjudication on the merits.

Appendix A

The teachings of the Supreme Court in *Costello v. United States*, 365 U.S. 265, 81 S. Ct. 534 (1961), require a different analysis and result. The Court there considered whether a district court's dismissal of a denaturalization action, because of the government's failure to file an affidavit of good cause, barred the government from filing a new complaint with the proper affidavit. The district court had not designated the dismissal as jurisdictional, nor had it stated whether the dismissal was with or without prejudice. 365 U.S. at 268, 81 S.Ct. at 536. The Court ruled that, despite the district court's silence on the question, the dismissal was jurisdictional within the meaning intended by Rule 41(b), and thus without prejudice. 365 U.S. at 285; 81 S. Ct. at 544. The Court noted that the term "lack of jurisdiction" as used in Rule 41(b) was a term of art, 365 U.S. at 287, 81 S. Ct. at 546, encompassing failure to comply with statutory prerequisites, 365 U.S. at 285, 81 S.Ct. at 545. Writing for the Court, Justice Brennan referred to the exception in Rule 41(b) for certain enumerated dismissals that are without prejudice, and explained:

> We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.

365 U.S. at 285, 81 S.Ct. at 545. The origins of this exception, according to Justice Brennan, were in the common law rule that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Id.* Justice Brennan noted that this principle had been applied at common law in many cases involving motions to dismiss by a defendant, and

that Rule 41(b) did not alter this rule. He quoted *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), accordingly: "If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." 365 U.S. at 286, 81 S.Ct. at 545.

Shortly thereafter, we interpreted *Costello* to mean that

> the preclusive effect afforded dismissals by Rule 41(b) was intended to apply only to those situations in which a defendant must incur the inconvenience of preparing to meet the merits of the plaintiff's claims because there is no initial bar to the court's reaching the merits as there would be, for illustrative purposes, if there were a defect in pleadings or parties.

Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964); *see also Saylor v. Lindsley*, 391 F.2d 965, 967, 969 (2d Cir. 1968) (in light of *Costello*, dismissal of derivative suit for failure to post bond, despite being labeled "with prejudice," did not bar subsequent suit by another stockholder because defendants were not required to prepare defense and court did not reach merits of plaintiff's substantive claim); *Papilsky v. Berndt*, 466 F.2d 251, 256-57 (2d Cir.) (similar), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 689 (1972); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 2373, at 405 (1995) ("[C]ourts have recognized that Rule 41(b) does not apply in situations in which a case is dismissed because of some initial bar to reaching the merits of the plaintiff's claims . . . .");

18 Charles A. Wright et al., Federal Practice and Procedure, Jurisdiction § 4437, at 347 (1981) ("In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit.").

Like the government's failure to file an affidavit of good cause in *Costello*, Criales's filing of a complaint based on an untimely underlying administrative charge, where he also had filed a timely charge upon which he had not yet received his right-to-sue notice, "simply constituted non-fulfillment of a prerequisite to the initiation of the proceedings." *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710, 713 (2d Cir. 1977) (interpreting *Costello*). AA had not been "put to the necessity of preparing a defense." *Costello*, 365 U.S. at 287, 81 S. Ct. at 546. Plaintiff had not yet fulfilled a statutory prerequisite to suit, but remained capable of fulfilling it. His suit was premature.

The district court's initial characterization of the first dismissal as being due to Criales's failure to satisfy a "statutory prerequisite[ ]" was entirely correct. *Criales I*, slip op. at 7, 8. The court described the dismissal in similar terms when it dismissed the Title VII claims in Criales's second complaint on res judicata grounds, stating that the first dismissal had been "predicated on a lack of a statutory prerequisite . . . .' " *Criales II*, 1995 WL 669900, at *6. The court went on, however, to conclude that a dismissal predicated on lack of a statutory prerequisite was not based on a "lack of jurisdiction." *Id.*

In light of *Costello*, *Nasser*, and similar decisions, the district court was drawing a distinction where one should not have been drawn. Criales simply had failed to comply "with a precondition requisite to the Court's

going forward to determine the merits of his substantive claim." *Costello*, 365 U.S. at 285, 81 S. Ct. at 545. Because he remained capable of complying with that precondition by instituting his suit after receipt of the right-to-sue notice on the timely charge, the dismissal of the first complaint should not have been found to operate as an adjudication upon the merits and as a bar to the subsequent complaint filed after the precondition had been satisfied. It was a dismissal "for lack of jurisdiction" within the special meaning of that term in Rule 41(b), as explained in *Costello*. *See Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 524 (5th Cir. 1980) ("Because a dismissal for failure to meet a condition for filing suit does not operate as an adjudication upon the merits, it cannot bar a subsequent suit between the parties.") (internal quotations omitted).

We recognize that the district court's dismissal of Criales's complaint arising from his untimely charge was styled as a dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and that dismissals under Rule 12(b)(6) are generally considered judgments on the merits, unless the court specifies otherwise. *See Federated Dep't Stores, Inc., v. Moitie*, 452 U.S. 394, 399 n.3, 101 S.Ct. 2424, 2428 n.3 (1981).

Nonetheless, we would not permit the choice of labels to distort substance, especially where the consequence would be so drastic as to deprive a party of the opportunity to be heard. Regardless whether characterized as a failure to plead the necessary elements of his cause of action, or as failure to comply with all the statutory prerequisites, the reason for the first dismissal was that plaintiff had not waited until receipt of the right-to-sue notice on his timely administrative charge. To consider

it an adjudication on the merits of his discrimination complaint is a distortion.

Furthermore, some authorities hold that a Rule 12(b)(6) dismissal "will not bar a second action if new facts have come into existence or have been alleged for the first time and it was the absence of these facts that made the first complaint defective." 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 2373, at 408 (1995) (citing cases). Here, the pertinent new fact was that Criales's second complaint was based on the EEOC's delivery of a right-to-sue notice upon Criales's timely charge.

The district court also noted that Criales had procedural means at his disposal either to compel the issuance of a right-to-sue notice on his timely complaint prior to the dismissal of his first action, or to convince the court to stay, rather than dismiss, the first action while awaiting the issuance of the right-to-sue notice on the timely charge. These observations were all true but, in our view, irrelevant to whether the dismissal of the initial action should have been considered an adjudication on the merits.[2] If anything, by stressing the simple procedural devices by which Criales might have avoided the drastic ruling, the district court's observations underscore the inappropriateness of denying him the opportunity to have his claim adjudicated. *Cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397, 102 S. Ct. 1127, 1134 (1982) ("a technical reading [of Title VII] would be 'particularly inappropriate in a statutory scheme in

[2] No contrary inference may be drawn from this court's denial of Criales's motion to withdraw his first appeal without prejudice. The prejudice in question related to the appeal of the first action. There was no suggestion that Criales's voluntary dismissal of the appeal should bar him from proceeding to file suit upon his timely charge, which is what he had told this court he intended to do.

which laymen, unassisted by trained lawyers, initiate the process' ") (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S. Ct. 616, 619 (1972)).

We noted in *Fay v. South Colonie Central School District*, 802 F.2d 21, 29 (2d Cir. 1986), that "[i]n properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive him of one." (quotation marks and citation omitted). Because plaintiff never had a day in court on his Title VII claims, and because his initial suit was dismissed by reason of a curable defect—his failure to satisfy a statutory prerequisite—we reverse the part of the judgment which held that res judicata barred those claims.[3]

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[3] *Samuels v. Northern Telecom Inc.*, 942 F.2d 834 (2d Cir. 1991), does not require a different result. In that case, the plaintiff voluntarily dismissed his first action "with prejudice" and his stipulation to this effect was so ordered by the court. Under Rule 41(a) such a dismissal so ordered with prejudice acts as an adjudication on the merits.

In contrast, the dismissal of Criales's complaint did not arise under Rule 41(a); rather, it was an *involuntary* dismissal under Rule 41(b), imposed because of Criales's failure to wait for the right to sue letter on his first administrative complaint. By the terms of Rule 41(b), an involuntary dismissal is on the merits *unless it is a dismissal for lack of jurisdiction* (as well as other specified exclusions). As explained above, *Costello* makes clear that a dismissal in these circumstances (for failure to comply with a statutory prerequisite to suit) operates as a dismissal for "lack of jurisdiction." Unlike the dismissal in *Samuels*, such a dismissal was not on the merits. Indeed, the judge did not say the dismissal was with prejudice. After the involuntary dismissal of his first action by reason of his failure to comply with the statutory prerequisite, Criales was free to file his second complaint without preclusion.

The dismissal "with prejudice" of Criales's appeal in his first action did not convert the prior dismissal of that action from one for lack of jurisdiction to one on the merits. The judgment of the district court remained what it was—a dismissal for lack of jurisdiction without preclusive effect. It could not be changed by the taking or dropping of an appeal. Thus, when Criales voluntarily dismissed *his appeal* from the first action with prejudice, that terminated *the first action*. It did not transform the dismissal from one for lack of jurisdiction to one on the merits.

We find no error in the district court's dismissal of the remaining federal claims. As to the pendent state claims, however, the district court dismissed these for lack of subject matter jurisdiction because there was no federal claim to which they could be appended. Our direction that Title VII claims be reinstituted nullifies the rationale for that ruling. The dismissal of the state claims is therefore also vacated.

III. Conclusion

The portions of the judgment dismissing plaintiff's Title VII claims on grounds of res judicata and dismissing pendent state claims are vacated. The dismissal of the remaining federal claims is affirmed. The action is remanded for further proceedings.

MINER, *Circuit Judge*, concurring in part and dissenting in part:

Because I agree with the district court that Criales' Title VII claims are barred by *res judicata*, I respectfully dissent from so much of the majority opinion as vacates the judgment dismissing the Title VII claims and pendent state claims. I concur in the majority opinion to the extent that it dismisses the remaining federal claims.

The prior action brought by Criales was dismissed as to the Title VII claims for untimely filing of his second employment discrimination complaint with the EEOC. The majority opinion acknowledges that the dismissal of the Title VII portion of the complaint in that action was grounded in Criales' failure to state a Title VII claim,

Fed. R. Civ. P. 12(b)(6), and that such a dismissal generally is considered a judgment on the merits. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981).

My colleagues nevertheless see the dismissal of the prior action as being for lack of jurisdiction within the intendment of Fed. R. Civ. P. 41(b) and therefore without prejudice to the bringing of a new action based upon the earlier timely filing with the EEOC. This analysis is predicated in the main upon the decision of the Supreme Court in *Costello v. United States*, 365 U.S. 265 (1961). In that case, the Court held that dismissal for the government's failure to file a statutorily required affidavit of good cause in a denaturalization action was for lack of jurisdiction under 41(b) and therefore without prejudice. There, the district court had not classified the dismissal as without prejudice or for lack of jurisdiction.

Aside from the fact that the district court in the opinion giving rise to this appeal makes it clear that the dismissal of the previous action was not intended to have a jurisdictional basis, precedent compels us to arrive at the same result. The Supreme Court could not have been more clear on this subject:

> We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). Whatever may have been the rule in *Costello*, it cannot be applied in a Title VII action involving untimely filing with the EEOC. It is because the "statutory requirement is analogous to a statute of limitations,"

Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996), that dismissal for failure to comply with the requirement is a judgment on the merits. *See PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896-97 n.2 (2d Cir. 1983) (holding that a dismissal on statute of limitations grounds is an adjudication on the merits for purposes of *res judicata*).

Although the result envisioned by the foregoing is most unfortunate, it could have been avoided. Criales could have moved for a stay in the prior action in the district court pending receipt of the right-to-sue letter that resulted from the timely filing of his first administrative complaint. *See Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 41 (2d Cir. 1992). In the alternative, Criales could have requested the district court to dismiss the prior action without prejudice to renewal upon receipt of the timely right-to-sue letter. Although Criales has conducted the bulk of this litigation as a *pro se* litigant, he did appear by counsel at various stages of the first action. Whether the fault is that of counsel or Criales himself, the failure to have considered these alternatives leaves Criales in his present bind.

Because the district court properly dismissed Criales' federal claims, it did not abuse its discretion in declining to exercise jurisdiction over his state law claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). Criales may bring his state claims in state court if he chooses to do so.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 6, 1995 (1995 WL 669900)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-95-1709

MAURICIO CRIALES,

Plaintiff,

-against-

AMERICAN AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

SUMMARY

This is the second action brought in this court by plaintiff Mauricio Criales ("Criales") in response to his employment termination by defendant American Airlines, Inc. ("AA"). Criales charges racial discrimination claims under Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §2000e *et seq.* ("Title VII") and 42 U.S.C. § 1981 ("§ 1981"), as amended by the Civil Rights Act of 1991; and pendent state law tort claims of intentional infliction of emotional distress, defamation, and slander.

AA moves in the alternative for a dismissal of the complaint

on the grounds of res judicata; for a dismissal of the complaint pursuant to Fed. R. Civ. Proc. 12(b)(1) or (6); or for summary judgment on the post-November 21, 1991 claims pursuant to Fed. R. Civ. Proc. 56 which would have the effect of dismissal. For the reasons below, AA's motion to dismiss is granted.

FACTS

For purposes of this motion to dismiss, the following facts are accepted as true. Plaintiff Mauricio Criales ("Criales"), is an American citizen, is Hispanic by descent, and was born in the Republic of Colombia. Complaint ¶ 2. Criales was hired by defendant American Airlines, Inc. ("AA") on or about November 10, 1990. Complaint ¶ 6.

Criales alleges that he experienced ridicule and harassment by various employees of AA during his employment because of his Hispanic or Latin ancestry. Complaint ¶¶ 7, 11, 12, 15-16, 19, 24, 29. Criales alleges that his supervisors at AA were aware of this harassment and condoned it. Complaint ¶¶ 13-14, 18, 27-28, 30, 36. For example, Criales alleges that a series of pranks involving AA's public address system caused him to perform badly and to lose his job. Complaint ¶¶ 25-26, 35, 42. In addition, Criales alleges that a disparate application of AA's regulations caused him to be fired wrongfully.

From September 20, 1991 to October 18, 1991, Criales and other AA employees were each allotted a $1,000 spending allowance for attending an avionics course in Chicago. Complaint ¶ 44-45. Criales filed a report seeking reimbursement of $729 for expenses incurred, including $120 in dry cleaning receipts incurred in Queens, New York. Complaint ¶ 46-47. Criales falsely reported that the $120 in dry cleaning had been

incurred at his hotel in Chicago, relying on statements by his co-workers that "everybody" submitted receipts for things they had not paid for and that AA "never even bothered to check expense reports." Complaint ¶ 48.

On December 7, 1991, AA placed Criales on suspension while investigating alleged expense accounts improprieties. Complaint ¶ 50. Criales states that at a mandatory pretermination AA hearing he was ignored with respect to his complaints of harassment. Complaint ¶ 68. On December 20, 1991, AA permanently terminated Criales' employment. Complaint ¶ 51.

On March 12, 1991, Criales and his union unsuccessfully contested his employment termination before a three-person arbitration panel of the American-Transport Workers Union New York Area Board of Adjustment. Complaint ¶ 62. Criales states that AA employees refused to supply him with documents he requested to prepare for the arbitration. Complaint ¶ 63-65. At the arbitration, Criales was not permitted to discuss discrimination and harassment he had experienced. Complaint ¶ 67.

The following facts are not based on statements made by Criales, but are based on documents submitted by AA's counsel ("AA Notice of Motion," "AA Brief"), the affidavit of AA's counsel ("Cerasia Aff't"), and documents of which Criales had knowledge.

After his termination, Criales filed two discrimination charges against AA: (1) a February 5, 1992 charge with the EEOC ("EEOC Charge No. 160-92-1069," " '1069 Charge"), which was transferred for processing to the New York State Division of Human Rights ("NYSDHR"); and, after hearing

nothing for several months from the NYSDHR, (2) a second, December 3, 1992 charge with the New York City Commission on Human Rights ("NYCCHR"), which was transferred for processing to the EEOC ("EEOC Charge No. 160-93-0816," " '816 Charge"). The EEOC dismissed the '816 Charge as untimely filed, but on October 26, 1993 issued Criales a "right-to-sue" notice in connection with that charge.

I. Criales I

On November 18, 1993, Criales filed a *pro se* complaint in this court, *Criales v. American Airlines, Inc.*, 93-CV-5340 ("*Criales I*"), based on the right-to-sue notice for the '816 Charge. Since many of the decisive factors in this case turn on the disposition of *Criales I*, a brief synopsis follows.

After filing his initial complaint, Criales retained present counsel. On July 29, 1994, Criales amended his complaint to state national origin discrimination violations of Title VII and § 1981 and pendent state law claims of defamation and intentional infliction of emotional distress.

This court granted AA's motion to dismiss the Amended Complaint in *Criales I* in a Memorandum and Order of November 14, 1994 ("Memo"), familiarity with which is presumed. Briefly, the Court made the following conclusions and findings:

> 1. A timely filed charge was a prerequisite to a federal Title VII case. Since the right-to-sue notice on which Criales sued was predicated on an untimely filed EEOC charge, the Court found that Criales had

failed to meet a prerequisite for bringing the case. Therefore, the Title VII claims were dismissed.

2. Section 1981 created causes of action only for racial discrimination and that Criales' general allegations of national origin discrimination did not constitute claims of racial discrimination. Furthermore, that the 1991 amendment making harassment actionable under § 1981 applied prospectively only to conduct occurring after November 21, 1991. Criales failed to allege any specific instances of harassment occurring after the effective date of the amendment. Therefore, the § 1981 claims were dismissed.

3. Since the underlying federal claims were dismissed it had no jurisdiction to consider the pendent state law claims. Therefore, the state law claims were dismissed.

On December 1, 1994 Criales filed a *pro se* Notice of Appeal with the Court of Appeals for the Second Circuit. On January 31, 1995, during the pendency of the appeal, Criales obtained a right-to-sue notice for the '1069 Charge. Criales attempted to append the new right-to-sue notice to his appellate brief.

AA moved to strike that right-to-sue notice since it was not in the lower court record. Criales moved to withdraw his appeal without prejudice, which AA opposed. The Court of Appeals permitted Criales to withdraw his appeal in *Criales I* with prejudice and denied AA's motion to strike as moot.

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II. Criales II

This case ("*Criales II*") arises from the '1069 Charge, which Criales timely filed with the EEOC on February 3, 1992. On February 7, 1992, the EEOC notified Criales and AA by letter ("NYSDHR Referral Letter") that the '1069 Charge had been referred for initial processing to the New York State Division of Human Rights ("NYSDHR");[1] and that Criales and AA had the right to request EEOC review of the NYSDHR's decision. Cerasia Aff't Exh. B. The NYSDHR Referral Letter stated, "For such a request to be honored, you must notify the Commission in writing within 15 days of your receipt of the Agency's final decision and order." Cerasia Aff't, Exhibit B.

On August 29, 1994, the NYSDHR notifies Criales and AA by letter ("NYSDHR Dismissal Letter") that the '1069 Charge had been dismissed. Cerasia Aff't, Exhibit C. The NYSDHR gave "administrative convenience" as the reason for dismissing the '1069 charge, explaining that *Criales I* was being litigated in Federal Court, "in which forum all the issues concerning the question of National Origin discrimination can be resolved." *Id.* The NYSDHR Dismissal Letter also notified Criales and AA of their right to seek state judicial review of the NYSDHR's dismissal and of the accompanying waiver of their right to federal judicial review. *Id.*

As has been indicated, on January 31, 1995, during the appeal of *Criales I*, Criales requested, and was given, a right-to-sue notice for the '1069 Charge. Complaint, Exhibit A. On April 28, 1995, Criales filed this complaint based on that notice.

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1. The EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter. Section 706(c) of 42 U.S.C. § 2000e-5(c).

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On July 10, 1995, AA moved to dismiss the complaint. Oral argument was held on October 20, 1995.

DISCUSSION

The chief issue in this case is whether the disposition of *Criales I* has a preclusive effect on the plaintiff's ability to maintain this action. In addition, the defendant raises other arguments in support of its motion to dismiss.

I. Motion to Dismiss Standards

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), the court must view all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Ortiz v. Cornetta*, 867 F.2d 146, 149 (2d Cir. 1989). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 493 U.S. 816 (1992). The court's consideration of a motion to dismiss is limited to the factual allegations in the complaint; documents incorporated by reference into the complaint; matters of which judicial notice may be taken; and documents either in plaintiff's possession or of which plaintiff had knowledge and on which plaintiff relied in bringing suit. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

II. Res Judicata

In general, a defense of res judicata must be affirmatively

pleaded. Federal Rule of Civil Procedure 8(c) ("Rule 8(c)"). However, if all relevant facts are shown by the court's own records, the court may uphold a defense of res judicata on a motion to dismiss for failure to state a claim without requiring an answer. *Day v. Moscow*, 955 F.2d 807 (2d Cir. 1992). Therefore, AA has properly raised the defense of res judicata in their motion to dismiss.

Res judicata, or claim preclusion, prevents litigation of a matter that could have been raised and decided in a previous suit, whether or not it was raised. *Murphy v. Gallagher*, 761 F.2d 878, 879 (2d Cir. 1985) (citing *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984)). A final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1980).

The Second Circuit prescribed the following three considerations for determining whether the disposition of one claim operates as res judicata on another: (1) whether the same transaction or connected series of transactions is at issue; (2) whether the same evidence is needed to support both claims; and (3) whether the facts essential to the second were present in the first. *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38-39 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993). With these considerations in mind, the Court will examine the possible preclusive effect of *Criales I* on each of the claims raised in this action.

III. Title VII and Section 1981 Claims

Section 1981 of 42 U.S.C. ("§ 1981") guarantees to all

persons within the jurisdiction of the United States the same rights under the law as are enjoyed by white persons. 42 U.S.C. § 1981. Section 1981 was amended in 1991 to provide remedies for intentional discrimination and to cover unlawful harassment in the workplace because of race. Pub.L 102-166, Nov. 21, 1991, 105 Stat. 1071, Civil Rights Act of 1991. The effective date of the amendment was November 21, 1991. *Id.*

Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e *et seq.* ("Title VII"), is both broader and narrower than § 1981. Title VII is broader in that it covers other bases of discrimination, such as national origin, sex or religion, whereas § 1981 covers only racial discrimination. Title VII is narrower in that it provides for detailed administrative remedies that must be exhausted before the statute's protections may be invoked in federal court.

Courts are not allowed to infer any positive preference for Title VII or § 1981 where the statutes do in fact overlap. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). However, courts should be reluctant to read § 1981 broadly where the result is to circumvent the detailed remedial scheme constructed in Title VII. *Id.* Therefore, although claims of employment discrimination or harassment in the workplace due to race could be brought under both statutes, § 1981 should not be used to avoid the procedural prerequisites of Title VII.

A. Section 1981 Claims

Criales' First and Second causes of action, as stated in the Complaint, are: (1) employment discrimination based on national origin, Complaint, ¶¶ 4-37; and (2) wrongful discharge and disparate impact of employer regulations due to race.

Complaint, ¶¶ 38-69. Criales states that these claims arise under § 1981. Criales Brief, 8 n.2.

First, there is a threshold issue of whether Criales has made out any cognizable claims under § 1981. The Complaint states that the First cause of action is for national origin discrimination. Since § 1981 applies only to discrimination based on race, a cause of action for national origin discrimination cannot be brought under that statute. However, in the Brief, Criales treats the First cause of action as one for discrimination based on race, stating that "Hispanic, Latin and Race are all terms . . . which are not mere 'national origin.' " Criales Brief, at 8 n.3.

In the Second Cause of Action, Criales alleges many specific incidents where he was singled out for disparate treatment by AA. However, the only places in which Criales alleges that the disparate treatment was due to his race are paragraph 37, where he incorporates by reference all the allegations in the First cause of action, and a conclusory statement in paragraph 69, where he states that the disparate treatment he experienced "is evocative of a climate of racial hostility, and of intolerance for Hispanics in particular."

Even assuming that these thinly pleaded allegations are sufficient to raise claims under § 1981, there remains the much more serious hurdle of res judicata. The conduct complained of here is essentially the same as that charged in *Criales I*. Both concern Criales' term of employment at AA, both allege facts involving harassment over the public address system, and both complain of discrimination regarding the expense reimbursement investigation, the pretermination hearing, Criales' termination, and subsequent arbitration. The only difference here is that this time, Criales has attributed AA's alleged conduct to his race, rather than his national origin.

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Since the harassment and discrimination claims here arise out of the same transaction, evidence, and facts as those in *Criales I*, Criales cannot allege any differences as a reason for raising § 1981 claims again. *Woods*, 972 F.2d at 38-39. That Criales may have pleaded these claims with more specificity this time or attributed the alleged discrimination to a different factor does not create different transactions, evidence, or facts.

The § 1981 claims based on these transactions, evidence, and facts were dismissed in *Criales I* for failure to state a claim. A dismissal for failure to state a claim under Rule 12(b)(6) is a "judgment on the merits" for purposes of res judicata, *Federated Department Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981). Therefore the dismissal of the § 1981 claims in *Criales I* is a "judgment on the merits" for purposes of res judicata.

Since a final judgment on the merits precludes the parties from relitigating issues that could have been raised in a prior action, *Federated Department Stores*, 452 U.S. at 398, and since Criales could have raised § 1981 claims of racial discrimination as well as national origin discrimination in *Criales I*, the Court holds that res judicata precludes Criales from bringing a claim against AA under § 1981 for workplace harassment occurring between November 20, 1990 and December 20, 1991.

B. Title VII Claims

Criales argues that the dismissal of *Criales I* has no res judicata effect on his Title VII claims because that case was predicated on an untimely filed charge. In doing so, Criales draws an analogy between the dismissal of *Criales I* and a dismissal for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 41(b) ("Rule 41(b)").[2]

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2. . . . Unless the court in its order for dismissal

(Cont'd)

The analogy is inapposite. Ordinarily, a timely filed EEOC charge is a condition precedent to bringing suit in federal court under Title VII. *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978) (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977)); *Edmonston v. MGM Grand Air, Inc.*, 808 F.Supp. 197, 202 (E.D.N.Y. 1992) (opinion of this court citing cases).

Although a timely filed EEOC charge has been called a "jurisdictional prerequisite," *see, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 108 (2d Cir. 1978), the Second Circuit has given the requirement of *timeliness* the effect of a statutory prerequisite in all but the most extraordinary circumstances. *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57, 60 (2d Cir. 1986).[3] Because they are subject to equitable tolling and estoppel, "Title VII's administrative time limits are not jurisdictional." *Weiss v. Coca-Cola Bottling Co. of Chicago,*

(Cont'd)

> otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

Rule 41(b) (emphasis added).

3. For example, tolling of the time periods provided by statute may be appropriate where the defendant has actively misled the plaintiff respecting the cause of action, where the plaintiff has in some extraordinary way been prevented from asserting his rights, or where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Smith*, 571 F.2d at 108) (citing *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 237 n.10 & 238 (1976)).

990 F.2d 333, 335 n.1 (7th Cir. 1993) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)); *see also Bayer v. U.S. Dept. of Treasury*, 956, F.2d 330, 332 (D.C. Cir. 1992). Rather, "timely filing and receipt of a right-to-sue letter is a *statutory* pre-requisite to bringing a Title VII claim." *Edmonston*, 808 F.Supp. at 202 (citing *Miller v. International Telephone & Telegraph Corp.*, 755 F.2d 20, 22-23 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985)) (emphasis in original).

The Court finds no extraordinary circumstances applicable here. Criales was represented by counsel in *Criales I* and thus had a means of acquiring knowledge of his rights and responsibilities under Title VII. *Smith*, 571 F.2d at 109-110. *Criales I* was dismissed for lack of a timely filed EEOC charge. Since a timely filed EEOC charge is a prerequisite to bringing suit under Title VII, the dismissal of *Criales I* was predicated on a lack of a statutory prerequisite, not a "lack of jurisdiction." Therefore, Criales cannot avail himself of the exception provided by Rule 41(b).

Since the Title VII claims here concern largely the same transactions, facts, and evidence as in *Criales I*, Criales' only argument against the application of res judicata is an appeal to the discretion of the Court to construe narrowly the preclusive effect of *Criales I*. Criales essentially argues that the issuance of the right-to-sue notice for the '1069 Charge implicates different "transactions, facts, or evidence" warranting a new case. The Court would have to find that Criales "could not have raised" the Title VII claims relating to the '1069 Charge in *Criales I* in order to permit Criales to raise them now.

Since "[a] party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise

matters clearly within the scope of a prior proceeding," *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 465 n.4 (1982), the issue is whether Criales' lack of a valid right-to-sue notice was caused by his own failure or by circumstances over which he had no control. The Court finds the cause to be the former.

While the absence of a valid right-to-sue notice may have rendered the claims in the '1069 Charge an improper subject for *Criales I*,[4] Criales failed to exercise available options for obtaining such a notice. Although the Court must draw all reasonable inferences in favor of the plaintiff, *Ortiz*, 867 F.2d at 149, the most reasonable inference that can be drawn from the pleadings is that Criales simply did not follow proper administrative procedure for obtaining a right-to-sue notice for the '1069 Charge.

Criales ascribes his delay in bringing this action to his "previous inability to obtain a right-to-sue notice." He explains that "the EEOC failed to provide a timely right-to-sue notice before this Court's dismissal of [*Criales I*]," but Criales has not alleged or made any showing that he attempted to obtain a right-to-sue notice or was in any way prevented from receiving one.

Criales ignored at least one of the most obvious alternatives for preserving his rights with regard to the '1069 Charge: EEOC review of the state agency's decision. The NYSDHR Referral Letter informed Criales of his duty to request EEOC review, if desired, within fifteen days after the dismissal of the charge by

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4. Since the December 3, 1992 charge was given a separate file number by the EEOC and was not consolidated with the February 5, 1992 charge, and since Criales had not obtained the requisite right-to-sue notice in connection with the February 5, 1992 charge, it was not a proper subject for *Criales I*. See *Smith*, 571 F.2d at 105, n.7.

NYSDHR. Since the NYSDHR Dismissal Letter notified Criales on August 29, 1994 that the charge had been dismissed, Criales could have requested review until about September 15, 1994. Since EEOC review would have been conducted only at the request of Criales, Criales cannot now assert his own failure to request review as "inability" to obtain a right-to-sue letter, absent a showing that he was refused such a request.

Criales also failed to pursue another means of obtaining review of the state agency dismissal of the '1069 Charge: state court review. Under New York election-of-remedies provisions, a state court lacks jurisdiction over employment discrimination claims once a charge is filed with a state agency, such as the NYSDHR. *Buscemi v. Pepsico, Inc.*, 726 F.Supp. 99, 100 (S.D.N.Y. 1989) (citing New York Executive Law § 297(9) (McKinney 1982 & Supp. 1989). A complainant's right to bring suit is restored if the NYSDHR dismisses the complaint on the grounds of administrative convenience. *Id.* Criales should have been aware that state court review was available, since the NYSDHR Dismissal Letter dated August 29, 1994 notified him of this option.

Finally, Criales failed to exercise an independent means of pursuing the allegations in the '1069 Charge: federal agency proceedings. Subsection (c) of 42 U.S.C. § 2000e-5(c) ("subsection (c)") provides that in "deferral" states such as New York,[5] a claimant may file a charge directly with the EEOC after sixty days of the commencement of state agency review,

5. New York is a state "which has a local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from [alleged unlawful employment] practice[s]" within the meaning of subsection (c). *See, e.g., Weise v. Syracuse*, 522 F.2d 397, 411-12 (1975).

or upon termination of such review, whichever is earlier. Since Criales filed the '1069 Charge on February 5, 1992, and since NYSDHR began review of the '1069 Charge on February 7, 1992, Criales could have filed a charge with the EEOC pursuant to subsection (c) sixty days after the commencement of NYSDHR's proceedings, or in April 1992. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980).

If the EEOC then dismissed the charge, Criales would have received in due course a right-to-sue notice under 42 U.S.C. § 2000e-5(f)(1) ("subsection (f)(1)").[6] Since Criales never filed an EEOC charge pursuant to subsection (c), the EEOC could not have dismissed the charge, nor filed a civil action on behalf of Criales, nor entered into a conciliation agreement to which Criales was a party. As a result, the EEOC did not notify Criales of any of these occurrences pursuant to subsection (f)(1). Hence, Criales received no "right-to-sue" notice.

If Criales had chosen to pursue any of these options, he could have stayed *Criales I* and then sought leave of the Court

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6. If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) . . . , whichever is later, the Commission has not filed a civil action . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party . . . the Commission . . . *shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge* . . . by the person claiming to be aggrieved.

42 U.S.C. § 2000e-5(f)(1) (emphasis added).

to amend the complaint to add a Title VII claim based on a proper right-to-sue notice. *Woods*, 972 F.2d at 40-41. Therefore, the Court finds that Criales' failure to obtain a timely right-to-sue letter for the '1069 Charge does not justify the commencement of a new federal court case.

In lieu of exercising these options, the proper course for challenging the dismissal of *Criales I* would have been for Criales to pursue a direct appeal or a motion to modify or to vacate the judgment pursuant to Federal Rule of Civil Procedure 60. An adverse judgment from which no appeal has been taken is res judicata and bars any future action on the same claim. *Federated Department Stores*, 452 U.S. at 399 n.4. Much as he may regret it now, Criales voluntarily gave up his right to attack the dismissal of *Criales I* when he withdrew the appeal with prejudice. If Criales had maintained his appeal, the Second Circuit might have held, as it did in *Dalessandro v. Monk*, 864 F.2d 6 (2d Cir. 1988), that the suit should have been stayed rather than dismissed, and then modified or reversed the judgment accordingly.

The Court cannot grant relief here that Criales should have sought in a previous action. The res judicata implications on a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong. *Federated Department Stores*, 452 U.S. at 398. Criales seems to argue that his *pro se* status during the appeal should somehow excuse the withdrawal of the appeal with prejudice. Since Criales was represented by counsel during the motion to dismiss and before withdrawing his appeal, he had ample opportunity to exercise any of these options. The Court finds his failure to do so insufficient to exempt him from the effect of res judicata.

In making this finding, the Court is well aware that Title VII requirements "exist not for their own sake, but rather in furtherance of dispute resolution through accommodation rather than litigation." *Weise v. Syracuse*, 522 F.2d 397, 412 (1975) (citing *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). Nevertheless, the plaintiff cannot reopen the door to the federal courts after voluntarily closing them behind him. Since Title VII's time limitations are "specifie[d] with precision," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), and since "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants," *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) (per curiam), the Court cannot waive procedural requirements because the plaintiff failed on the first try.

Sound policy reasons underlie the Court's finding that Criales is precluded from making a second Title VII complaint for essentially the same behavior at issue in *Criales I*. If a plaintiff could file multiple EEOC complaints for the same conduct and were allowed to commence a separate action for each right-to-sue notice, a claimant could continue to sue on different notices until he achieved a favorable result. The administrative provisions of Title VII would be meaningless if a claimant could assert his own failure to invoke them as a basis for preserving the right to bring innumerable federal judicial proceedings. *See Soso Liang Lo v. Pan American World Airways, Inc.*, 787 F.2d 827, 828 (2d Cir. 1986). For all these reasons, the court finds that res judicata prevents Criales from bringing the Title VII claims in this action.

IV. Failure to State a Claim

Even if, as plaintiff urges, the Court treated this case as a

"different transaction" in order to escape the effect of claim preclusion, there would be other difficulties for Criales to surmount. The Court would have to consider whether the Complaint is within the scope of the underlying EEOC charge as well as the possible adverse effects of plaintiff's 52-month delay in bringing this action.

A. Scope of Complaint

A district court only has jurisdiction to hear Title VII claims that are included in an EEOC charge or that are based on conduct "reasonably related" to that alleged in the EEOC charge. *Butts v. City of New York Dept. of Housing*, 990 F.2d 1397, 1401 (2d Cir. 1993). To do otherwise would defeat the policy underlying the notice provision, which is "to encourage settlement of discrimination disputes through conciliation and voluntary compliance." *Id.*

Criales urges the court to construe claims of racial discrimination as "reasonable outgrowths" of the '1069 Charge. In the '1069 Charge, Criales marked "national origin" as the basis for discrimination and added

> I allege that I have been discriminated against on the basis of my national origin (Colombia) in violation of Title VII of the Civil Rights Act of 1964, as amended, in that there is inconsistency in Respondent's disciplinary policy.

The Court does not find racial discrimination claims "reasonably related" to Criales' underlying charge, which alleged only national origin discrimination. Criales could have included

"racial discrimination" as a basis for the '1069 Charge, but did not. Since Criales did not allege racial discrimination in the '1069 Charge, Criales cannot now broaden his complaint to include racial discrimination claims against AA.

In addition, the Court considered the difference between national origin discrimination and racial discrimination in *Criales I* and found the difference substantial. Memo, at 10 ("the Supreme Court did not interpret racial discrimination so broadly as to include discrimination based on 'national origin' ") (citing *Saint Francis College v. Al-Khazraji*, 481, U.S. 604, 613 (1987)). To allow Criales to sue on racial discrimination claims where the underlying EEOC Charge alleged only national origin discrimination would enable Criales to circumvent this Court's previous distinction and render the "reasonably related" standard all but meaningless.

Since Criales' underlying EEOC charge does not allege racial discrimination, Criales' Title VII claims of racial discrimination are not claims on which relief can be granted. Therefore, dismissal of Criales' claims of racial discrimination would be appropriate in any event under Rule 12(b)(6).

B. Statute of Limitations

Even assuming that the Court should treat the claims deriving from the '1069 Charge as an independent cause of action, the Court would have to consider the effects of Criales' long delay in bringing this action.

A court should look to state statutes of limitations for § 1981 actions. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987); *Tadros v. Coleman*, 898 F.2d 10, 12 (2d Cir.),

cert denied, 498 U.S. 869 (1990). The applicable statute of limitations in New York is three years. *Id.*; *Butts*, 990 F.2d, at 1412. Since the alleged discriminatory conduct ended on December 20, 1991, Complaint, ¶ 51, and since this action was commenced on April 28, 1995, more than three years after the alleged discrimination ended, New York law would bar the § 1981 claims. The pendent state law claims would be similarly barred.

Criales admits that the three-year statute of limitations would ordinarily bar this action, but argues that his § 1981 claims and pendent state law claims are subject to equitable tolling due to his "continued attempts to bring this case to a trial on the merits." However, for the reasons discussed above under "Res Judicata: Title VII Claims," the Court finds that Criales did not diligently pursue proper procedures for bringing this case to trial. For example, Criales could have instituted a state court action well within the New York statute of limitations, or sought a stay of *Criales I* while he obtained a proper right-to-sue letter.

Therefore, equitable tolling of the statute of limitations is unwarranted. The Court finds that the statute of limitations would bar Criales from maintaining the § 1981 and pendent state law actions at this time.

V. Summary Judgment

AA moves this court in the alternative for an order dismissing Criales' post-November 21, 1991 harassment claims pursuant to Federal Rule of Civil Procedure 56 ("Rule 56").

The Local Civil Rules of the Eastern District of New York provide in part that

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> Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contests there is no genuine issue to be tried. Failure to submit such a statement constitutes grounds for denial of the motion.

Local Civil Rule 3(g) ("Rule 3(g)"). AA, the moving party, provided such a statement.

The party opposing a motion for summary judgment must submit a statement of material facts as to which it contends there is a genuine issue to be tried. *Id.* The local rules further provide:

> All material facts set forth in the statement required to be served by the moving party *will be deemed to be admitted unless controverted* by the statement required to be served by the opposing party.

Id. (emphasis added).

Criales did not submit any statement in opposition to AA's Local Rule 3(g) statement. Therefore, the Court deems the facts in AA's Rule 3(g) statement to be admitted. The Court finds that a grant of summary judgment in favor of AA would be appropriate as an alternate basis for dismissal of this portion of defendant's complaint. *Dusanenko v. Maloney*, 726 F.2d 82, 84 (2d Cir. 1984) (per curiam).

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VI. Pendent State Claims

Criales concedes that if AA's motion to dismiss is granted as to the § 1981 and Title VII causes of action, there is no supplemental basis for pendent jurisdiction for the Third and Fourth causes of action, his state law claims. Criales Brief, at 6 n.1. Accordingly, those claims are dismissed for lack of subject matter jurisdiction. *Dunton v. County of Suffolk*, 729 F.2d 903, 910-11 (2d Cir. 1984).

VII. Relief

AA moves this court for an award of costs, attorney fees, and other appropriate relief. The Federal Rules of Civil Procedure provide for the award of costs "as of course" to the prevailing party unless the court otherwise directs. Fed. R. Civ. Proc. 54(d)(1); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). The Court hereby directs otherwise and AA's motion for an award of costs and attorney's fees is hereby denied.

CONCLUSION

For the reasons discussed above, Criales is precluded from asserting claims against AA of wrongful termination under Title VII and claims of harassment or discrimination under 42 U.S.C. § 1981. As a result, the Court lacks supplemental jurisdiction to consider the state law claims of defamation, slander, and intentional infliction of emotional distress. Accordingly, defendant's motion to dismiss is granted; defendant's motion for costs and attorney's fees is denied; and the plaintiff's complaint is dismissed in its entirety.

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SO ORDERED

Dated: November 6th, 1995
Brooklyn, New York

s/ I. Leo Glasser
I. Leo Glasser, U.S.D.J.

Copies of the foregoing Memorandum and Order were this day sent to:

Joseph A. Bondy, Esq.
Canton & Jasper
276 Fifth Avenue
New York, New York 10001

Edward Cerasia II, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
900 Third Avenue
New York, New York 10022

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 14, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-93-5340

MAURICIO CRIALES,

Plaintiff,

-against-

AMERICAN AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

GLASSER, United States District Judge:

This is a motion to dismiss brought by defendant American Airlines, Inc. pursuant to Federal Rule of Civil Procedure 12(b)(6). In its Notice of Motion, American Airlines also requests an award of costs and attorneys' fees.

BACKGROUND

For purposes of this motion to dismiss, the following facts are accepted as true. Plaintiff Mauricio Criales ("Criales") was employed by defendant American Airlines as a commercial airline mechanic from, on or about November 10, 1990 to December 20, 1991. Amended Complaint ¶ 6. Criales, an

American citizen, was born in Colombia and is of Colombian descent. Amended Complaint ¶ 5.

During the term of his employment, Criales alleges, he was subjected to ridicule and harassment by various employees of American because of his "Colombian ethnicity" and national origin. Amended Complaint ¶ ¶ 7-10, 12-20, 22-23, 26, 27-29. Criales' superiors and supervisors at American were aware, he alleges, that other employees were ridiculing him. Amended Complaint ¶ ¶ 11, 19, 21.

Criales was suspended by American Airlines on December 7, 1991, and was terminated by American, after an investigation into alleged expense account improprieties, on December 20, 1991. Amended Complaint ¶ ¶ 43, 44. Criales had been sent to a training course in Chicago from September 20, to October 18, 1991, and had been given a one thousand dollar spending allowance for that period. Amended Complaint ¶ ¶ 37 - 38.

Criales filed an expense report indicating that he had spent $729.00 of the $1,000 during the month-long course. Amended Complaint ¶ 39. Included in the $729 was $120 for dry cleaning expenses incurred in Queens, New York while Criales was home visiting his wife and children. Amended Complaint ¶ 40. Criales reported those expenses as having been spent at the Ramada Inn in Chicago, based on his understanding from fellow mechanics that " 'everybody' submitted receipts with their expense vouchers for things they had not paid for," and that American did not check expense reports. Amended Complaint ¶ 41. Criales also believed that he was entitled to charge his drycleaning expenses to American. Amended Complaint ¶ 41. Criales further alleges, on information and belief, that he "was singled out for investigation and was the only employee of

defendant American who had been investigated and terminated for expense report falsification since the course's inception." Amended Complaint ¶ 50.

In March 1992, Criales and his union presented his complaint to a three-member arbitration panel that confirmed that Criales' termination was for "just cause." Amended Complaint ¶ 45; Defendant's Memorandum in Support of its Rule 12(b)(6) Motion to Dismiss ("Defendant's Memo"), p. 9. Criales was not supplied with documents he requested in order to prepare for the arbitration and was precluded from discussing the acts of harassment at the arbitration hearing. Amended Complaint ¶ ¶ 46-48. Criales also states that American's management did not consider his complaints of discriminatory harassment and his dry cleaning receipts from Queens, during his pre-termination hearing. Amended Complaint ¶ 49.

The following facts are not based on statements made by Criales, but are based on documents submitted by American Airlines' counsel, together with his affidavit. Although there is some disagreement as to whether Criales' attorney had these documents in his possession, it does not appear to be disputed that Criales had knowledge of the relevant documents. On February 5, 1992, Criales filed a complaint under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission ("EEOC"), which referred it to the New York State Division of Human Rights ("NYSDHR") on February 7, 1992. Cerasia Aff't, Exhibits B, C. In that complaint, Criales states that he "experienced harassment" during his employment with American and that he had been discriminated against on the basis of national origin, in that American's disciplinary policy was inconsistently applied. Cerasia Aff't Exhibit B. The date of the violation complained of is December

20, 1991, the date of Criales' termination. Thus, this claim appears to be limited to a charge of wrongful termination.

Criales also filed a complaint, against American and various employees of American, with the New York City Commission on Human Rights ("NYCCHR") on December 3, 1992, which was referred to the EEOC on January 6, 1993. Cerasia Aff't Exhibit A. That complaint alleged specific acts of harassment and charged that American Airlines "discriminated against him in the terms and conditions of his employment and terminated his employment on the basis of his national origin" in violation of the Administrative Code of the City of New York. Cerasia Aff't, Exhibit A, ¶ 18. Criales also charged that American Airlines "violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, on the basis of his national origin." Cerasia Aff't, Exhibit A, ¶ 19.

Criales' December 3, 1992 claim was dismissed by the EEOC because it was untimely filed and a "right to sue" notice was issued on October 26, 1993. Amended Complaint, Exhibit A. Criales filed a complaint in this court on November 18, 1993; this Motion to Dismiss is addressed to the Amended Complaint dated July 29, 1994. On August 10, 1994, the NYSDHR issued a notice of its intention to dismiss Criales, February 5, 1992 claim because this claim had been filed in this court. Cerasia Aff't, Exhibit D. The NYSDHR did, thereafter, dismiss the claim on August 29, 1994. Defendant's Reply Memorandum in Further support of it Rule 12(b)(6) Motion to Dismiss ("Defendant's Reply Memo"), Exhibit 7.

The Amended Complaint alleges four causes of action: (1) "Employment harassment based upon national origin," Amended Complaint ¶ ¶ 4-29; (2) "Wrongful discharge from

employment based on national origin," Amended Complaint ¶¶ 30-51; (3) "Defamation based on libel and slander per se," Amended Complaint ¶¶ 52-61; and (4) "Intentional infliction of emotional distress." Amended Complaint ¶¶ 62-64.

DISCUSSION

I. Motion to Dismiss Standards

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must view all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Ortiz v. Cornetta*, 867 F.2d 146, 149 (2d Cir. 1989). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 493 U.S. 816, 112 S. Ct. 1943, 118 L.Ed 2d 548 (1992). The court's consideration of a motion to dismiss is limited to the factual allegations in the complaint; documents incorporated by reference into the complaint; matters of which judicial notice may be taken; and documents either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993).

As an initial matter, plaintiff asks the court to ignore Criales' December 3, 1992 complaint filed with the City of New York Commission on Human Rights, and the NYSDHR's notice of intention to dismiss the initial complaint filed by Criales. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss ("Plaintiff's Memo") p.4, fn. 4. Plaintiff's attorney

contends that he had neither knowledge nor possession of these documents at the time the Amended Complaint was filed and, accordingly, they may not be relied upon.[1] However, there does not seem to be any dispute as to *plaintiff's* knowledge or possession of these documents. Accordingly, the court may rely on these documents in considering this motion to dismiss. *Cortec Indus., Inc. v. Sum Holding Co.*, 949 F.2d 42, 48 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1561 (1992).

II. Title VII claims

The timely filing of a charge with the EEOC and the receipt of a right-to-sue notice are statutory prerequisites to bringing a Title VII claim in the federal courts. *See*, e.g., *Edmonston v. MGM Grand Air, Inc.*, 808 F.Supp. 197, 202 (E.D.N.Y. 1992). As such, these requirements are subject to equitable modification when appropriate. *Hladki v. Jeffrey's Consol. Ltd.*, 652 F.Supp. 388, 392 (E.D.N.Y. 1987).

Criales clearly has not satisfied the statutory prerequisites to filing a Title VII claim. At the time he filed his complaint, Criales had received a right-to-sue notice based on an untimely filed charge (the December 3, 1992 charge). The complaint was not based on the charge that Criales had timely filed (on February 5, 1992) with the EEOC — that claim was before the NYSDHR (to which it had been deferred by the EEOC) when Criales filed his complaint in federal court. Thus, the only Title VII claim before this court is one based on the untimely charge that Criales filed with the NYCCHR on December 3, 1992.

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1. Ignoring these documents, plaintiff contends that, due to administrative error, a new case number was issued with respect to the complaint filed by Criales on February 5, 1992 and that, as a result of that renumbering, it was dismissed as untimely filed. Plaintiff's Memo, p. 3.

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This court, in *Hladki*, reviewed the reasons that would justify equitable modification of the statutory prerequisites to a Title VII action:

> "(1) when a claimant has received inadequate notice; (2) when a motion for appointment of counsel is pending; (3) when a court has led a plaintiff to believe that he or she has done everything required; (4) when affirmative misconduct by a defendant has lulled a plaintiff into inaction [citations omitted] . . . ; (5) when a 'plaintiff has in some extraordinary way been prevented from asserting his rights'; (6) when a plaintiff 'has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum' [citations omitted] . . . ; (7) when a right to sue letter has been received subsequent to commencement of a Title VII action and while the action is still pending, [citations omitted] . . . ; or (8) when the EEOC or Attorney General has incorrectly refused to issue a right to sue letter [citations omitted]."

Hladki, 652 F. Supp. at 393. Criales has not alleged that entitled to equitable consideration on the basis of any of these factors. Instead, Criales asserts that the right-to-sue letter on which he sued mistakenly referred to an untimely filed charge because of administrative error (that is, the renumbering of his original claim). Plaintiff's Memorandum, p. 15. However, plaintiff's claim of "bureaucratic inefficiency" is not supported by the documents. Plaintiff makes no attempt to correlate his claims

for relief to these documents, but rather asks the court to ignore several of the documents related to claims that he filed, and grant relief from the statutory prerequisites to a Title VII claim based on this revised state of events.[2]

Because Criales' claim is based on an untimely filed charge, he has not satisfied the statutory prerequisites for a Title VII claim. Neither has Criales presented this court with reasons justifying equitable modification of those requirements. Accordingly, defendant's motion to dismiss Criales' Title VII claims is granted.

III. Substantive claims: Federal Law

Section 1981 claims: Plaintiff's remaining federal claims are brought under section 1981, which prohibits discrimination by reason of race in making and enforcing contracts. Prior to the 1991 Act, harassment claims were not actionable under 42 U.S.C. § 1981. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Section 101 of the 1991 Act amended § 1981, effectively overruling *Patterson*, by defining the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). The 1991 Act amendment to § 1981 does not apply to conduct prior to November 21, 1991. *Rivers v. Roadway Exp., Inc.*, 114 S.Ct 1510, 1519-20 (1994). Furthermore, because the 1991 Act created liabilities for conduct

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2. In any event, a reading of the supporting documents in accordance with plaintiff's suggestion would limit his Title VII claim to one for wrongful discharge, as that was the only discrimination charged in Criales' February 5, 1992 complaint. However, Criales relies solely on § 1981 in prosecuting his wrongful discharge claim. Plaintiffs Memorandum pp. 21, 27-31.

that had no legal consequences previously, such pre-1991 Act conduct cannot be considered in determining the existence of a cause of action under § 1981. *Tillman v. St. Vincent's Hospital*, 1992 WL 426882 (S.D.N.Y.). Thus, in determining whether Criales has an actionable claim for harassment under § 1981, the court can only consider the conduct of defendant from November 21, 1991 until December 7, 1991 (the date Criales was suspended).

Before considering Criales' § 1981 claim, the court must consider whether the statute embraces discrimination based on national origin. In *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the Supreme Court held that racial discrimination includes discrimination against "identifiable classes of persons . . solely because of their ancestry or ethnic characteristics." *Id.* at 613. The Supreme Court recognized that the "racial discrimination" that Congress intended to forbid could not be understood "in terms of modern scientific theory." at 613. Although "§ 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive grouping of *homo sapiens*,' . . . a distinctive physiognomy is not essential to qualify for § 1981 protection." *Id.* However, the Supreme Court did not interpret racial discrimination so broadly as to include discrimination based on "national origin." Thus, the Supreme Court stated "If respondent . . . can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, *rather than solely on the place or nation of his origin*, . . . he will have made out a case under § 1981." *Id.* (emphasis added).

Although plaintiff, in his memorandum in opposition to this motion, attempts to equate national origin with "ancestry and

prevailing characteristics," the allegations in the complaint rely strictly on national origin. The Supreme Court's holding in *Saint Francis* precludes the plaintiff's argument that the term "national origin" is "synonymous with his ancestry and ethnic characteristics." Plaintiff's Memorandum, pp. 30 -31. Thus, because Criales' § 1981 claim for wrongful discharge is based on "national origin," that claim must be dismissed.

Similarly, except for a general allegation that "From the second day of his employment until the moment of his termination on December 20, 1991, Mr. Criales was subjected to intentional and continuous public ridicule and harassment with respect to his Colombian ethnicity," the acts complained of as the basis for Criales' § 1981 claim relate to discrimination based on national origin. Amended Complaint ¶ ¶ 1, 7. Criales alleges only one specific act of harassment based on "Colombian ethnicity." However, that act occurred from "on or about November 20, 1990 to November 27, 1990," prior to the effective date of the 1991 Act. Amended Complaint ¶ 10. Accordingly, Criales' harassment claim under § 1981 must also be dismissed.

IV. Arbitration Board's Non-neutrality

In his memorandum opposing this motion, Criales attacks the neutrality of the arbitration board that heard his claim. Although the Amended Complaint did not seek to set aside the board's decision, Criales asserts that the board's non-neutrality "when proven through further discovery, constitutes sufficient grounds to overturn the board's decision." Plaintiff's Memorandum, p. 2, n.2.

The bases on which a court may set aside the arbitration board's decision are limited to those set forth in Section 153

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First (q) of the Railway Labor Act: non-compliance, ultra-vires acts and fraud/corruption. *See Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 93 (1978). Criales, in relying on *Pacific & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1149 (9th Cir. 1991), appears to be implying that the arbitration board's partiality constitutes fraud.

As this court said in *Weik v. American Airlines*, CV-91-2617, to demonstrate fraud or corruption, a plaintiff must show more than "partiality," citing as examples cases in which one board member lied and misrepresented facts to other board members, or in which a party (or board member) had bribed a board member. *Pacific & Arctic Ry. & Navigation Co.*, the case relied on by Criales, also involved something more than partiality in the arbitration board's proceedings. In that case, an arbitration board member who exhibited partiality also had *ex parte* contacts with a member of the union's board.

The Amended Complaint filed by Criales includes allegations indicating that Criales was unable to obtain documents he requested in order to prepare for the arbitration proceeding and that he was precluded from discussing the harassment which he had experienced during the arbitration proceedings. Amended Complaint ¶ ¶ 46 - 48. Although these allegations might conceivably suggest partiality on the part of the arbitration board, they fail to allege anything more, which would be required for "partiality" to rise to the level of "fraud or corruption." *See Weik*, at p. 3.

Accordingly, this claim should be dismissed.

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V. State Law Claims

This court's dismissal of plaintiff's federal claims compels the dismissal of his state law claims for lack of subject matter jurisdiction. *Dunton v. County of Suffolk*, 729 F.2d 903, 910-911. Accordingly, this court will not discuss the merit of Criales' state law claims for defamation and intentional infliction of emotional distress.

CONCLUSION

Because plaintiff's complaint fails to set forth facts which would entitle him to relief, defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is granted. American Airlines' request for an award of costs and attorneys' fees is denied.

SO ORDERED.

Dated: Brooklyn, New York
November 14th 1994

s/ I. Leo Glasser
I. Leo Glasser, U. S. D. J.

APPENDIX D — DENIAL OF PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 23, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-third day of April one thousand nine hundred and ninety-seven.

Dkt. No: 95-9170

Criales

Appellant,

v

American Airlines

Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee American Airlines, Inc.,

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Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney